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APPENDIX

Supreme Court, U.S.
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**In The
Supreme Court of the United States**

October Term, 1978

No. 78-756

STATE OF OHIO,
Petitioner,

vs.

HERSCHEL ROBERTS,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

**Petition for Certiorari Filed October 17, 1978
Certiorari Granted April 16, 1979**

TABLE OF CONTENTS

I. Docket Entries:

- A. Opinion, Judgment, and Mandate of the Supreme Court of Ohio (Note) 1
- B. Opinion and Judgment of the Court of Appeals for Lake County, Ohio 1, 7

II. Record:

- A. Voir Dire examination of Amy Isaacs 8
- B. Voir Dire argument regarding the admissibility of the transcribed testimony of Anita Isaacs 12
- C. Testimony of Anita Isaacs 16
- D. Additional instructions to the jury regarding the transcribed testimony of Anita Isaacs 23

DOCKET ENTRIES

A. Opinion, Judgment, and Mandate of the Supreme Court of Ohio.

Note: The opinion, judgment, and mandate of the Supreme Court of Ohio are printed in the Appendix to the Petition for Certiorari, at pages 15-28 of the petition.

B. Opinion and Judgment of the Court of Appeals for Lake County, Ohio.

OPINION OF THE COURT OF APPEALS FOR LAKE COUNTY

(Dated February 14, 1977)

Case No. 5-297

COURT OF APPEALS OF OHIO
ELEVENTH DISTRICT,
COUNTY OF LAKE

STATE OF OHIO,
Appellee,

VS.

HERSCHEL ROBERTS,
Appellant.

ANNOUNCEMENT OF DECISION

This cause came on to be heard upon the record in the Trial Court, and was briefed and argued by counsel for the parties. Upon consideration whereof, this Court certifies that in its opinion substantial justice has not been

done the party complaining, as shown by the record of the proceedings and judgment under review, and the judgment of the Trial Court is reversed. Each assignment of error was reviewed and, upon review the following disposition made:

The appellant, Herschel Roberts, was arrested by the Mentor Police Department on January 7, 1975, on a charge of Forgery. (Later a charge of Receiving and Concealing Stolen Property was added.) After numerous continuances, the case was tried before a jury on March 4, 1976. At that time, the appellant was found guilty on both counts.

During the course of the trial and over appellant's objections, the trial court permitted the introduction to evidence of a prior recorded transcript from an earlier preliminary hearing.

This cause is before the Court of Appeals as of right from the judgment of conviction and sentence below.

The appellant assigned two errors. The first is that the trial court violated appellant's Sixth Amendment rights to confrontation and deprived the jury of their right to study the witness on the stand by admitting into evidence a transcript of a prior preliminary hearing in which an absent witness testified.

The constitutional question assigned here was timely and properly raised in the trial court. The pertinent portion of Amendment VI is as follows: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

The State of Ohio, at R. C. 2945.49 and at Criminal Rule 15, gives some sanction to the usage of testimony taken at a preliminary hearing at which the defendant is present to be used at trial when (1) the witness giving such testimony is dead at time of trial, (2) has become

incapacitated to testify, or (3) cannot for any reason be produced at the trial.

Prior recorded testimony since the decision of *Mattox v. U. S.*, 156 U. S. 237 (1895) has been admissible in appropriate cases until *Barber v. Page*, 390 U. S. 719 (1968). In *Barber supra*, the petitioner had been convicted on the basis of testimony introduced through a transcript of a preliminary hearing. The witness in question was incarcerated in a federal prison. The Supreme Court held that the state could not, consistent with constitutional requirements, use that transcript in lieu of the witness unless (1) the witness was shown to be actually unavailable to testify at trial, and (2) the witness had been adequately confronted and cross-examined at the prior hearing. The Supreme Court concluded neither condition had been met in that the State had failed to make a good faith effort to secure the presence of the witness at trial and hence it could not be said the witness was unavailable and further, that the preliminary hearing did not afford adequate pre-trial opportunity for confrontation and cross-examination.

With that background, let us look at the facts of this case. The absent witness whose testimony was sought to be used by the State was the defendant's witness at the preliminary hearing. It doesn't matter that his testimony was not favorable to the defendant, as that information, in this case, is after the fact and should never have been learned by this Court. What is important is that the Sixth Amendment says the accused shall enjoy the right to be confronted with the witnesses against him. This right of confrontation of the absent witness, as a witness against him, did not occur at trial.

Second, under the applicable statute, 2945.49 only the third reason noted above is appropriate, and that is that

the witness cannot for any reason be produced at trial. In view of the Supreme Court's admonition in Barber, it would appear necessary for the prosecution to show that the witness was actually unavailable to testify at trial. We do not have that clear-cut unavailability of the witness demonstrated here. The Prosecutor, in his brief, said, "The specific facts show that Anita Isaacs was not available at the time of trial. First, there was the fact that the State did subpoena her on numerous occasions but could not obtain service. Second, there is the testimony of her mother, Amy Isaacs." Amy Isaacs recounted, upon voir dire examination, that her daughter had been absent from the State of Ohio for over thirteen months, although she had talked with her twice in the past summer (R. 198). In checking on the return of the subpoenas in the record, all show, contrary to the Prosecutor's statement, that service on Amy Isaacs was made. The matter had been set for hearing on several occasions, and five subpoenas for Anita Isaacs, all to the same address, were issued. The first two show that returns were made on November 3 and 4, 1975, respectively. A third, showing return of service on December 10, 1975, carried the advice on the subpoena to "please call before appearing" on date of trial. The fourth and fifth returns, showing service on February 3, 1976, and February 25, 1976, carry the same instructions. The address of the residence served, if there was residence service as opposed to personal service, was that of the parents of Anita Isaacs, according to Mr. Isaacs' testimony concerning his home address. In addition to the issuance of five subpoenas either by personal or residence service with instructions to call before appearing we have the testimony of Amy Isaacs that she had talked to her daughter in the preceding thirteen months as well as with her daughter's social worker in San Francisco, California.

In contrast to that information, we have no witness from the prosecution to testify (1) that the subpoenaed witness never called, (2) that the subpoenas could never be personally delivered, (3) that no one on behalf of the State could determine Anita's whereabouts, (4) that anyone had exhausted contact with the San Francisco social worker, and (5) neither of the parents Isaacs stated that anyone had left residence service of subpoena for Anita at their residence. In short, it was not clearly shown to the Court that the witness was actually unavailable to testify at trial as required in Barber. Had the State demonstrated that its subpoenas were never actually served on the witness and that they were unable to make contact in any way with the witness, there would have been a showing of a good faith effort to secure the presence of the witness at trial. We do not think the State, in the voir dire requested by the defendant, established the actual unavailability of the witness, Anita. On the contrary, the prosecution, at least until time of trial, surely was in frequent touch with the Isaacs, the victims of the forged check and owners of the stolen property. If Anita was truly unavailable, the prosecution would or should have learned this from the Isaacs every time she was subpoenaed at their residence. Until the Isaacs' voir dire, requested by the defense, the State had done nothing, absolutely nothing, to show the Court that Anita would be absent because of unavailability, and they showed no effort having been made to seek out her whereabouts for purpose of trial. In the cross-examination of the State's witnesses, up until the voir dire examination of Mrs. Isaacs, it is apparent from testimony at pages 94, 121, 126, 172, 190, and 191, that Mrs. Isaacs' daughter Anita may have been rather closely linked to the defendant in his criminal involvements. We make this commentary only to show

that Mrs. Isaacs' comments about Anita's whereabouts at time of trial may have been less than candid, and hence possibly lacking in the truth necessary for the State to show the absent witness's unavailability. We do not think the State met the statutory test of proof the witness could not be produced at trial for any reason when the guidelines under Barber require a "good faith effort" on the part of the State to secure the presence of the witness.

We do not think the testimony of defendant's own witness taken at preliminary hearing falls within the meaning of the Sixth Amendment when it says the accused shall enjoy the right to be confronted with the witnesses against him (at no hearing was the absent witness declared to be a hostile witness). For the reasons indicated, we find this assignment of error well taken.

* * * * *

Consistent with our reasoning as it applied to Assignment of Error No. 1, this cause is reversed and remanded to the trial court for further proceedings consistent therewith and in accordance with law.

Judgment reversed.

EDWIN T. HOFSTETTER
Judge

COOK, P.J.,

O'NEILL, J., concur

(JOSEPH E. O'NEILL, *Judge*, Seventh District, Sitting by Assignment in Eleventh District)

*A portion of this Opinion, having no bearing whatever on the issues presented, has been omitted.

JOURNAL ENTRY OF THE COURT OF APPEALS FOR LAKE COUNTY

(Filed March 14, 1977)

Case No. 5-297

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO

THE STATE OF OHIO,
Plaintiff-Appellee,

vs.

HERSCHEL ROBERTS,
Defendant-Appellant.

JOURNAL ENTRY

This cause came on to be heard upon the appeal of Appellant, Herschel Roberts, briefs, transcript of the docket, the record, original papers and pleadings, journal entries and oral arguments submitted by counsel to this Court.

On consideration, the Court finds Assignment of Error No. 1 well taken, that there is error manifest upon the face of the record to the prejudice of the Appellant, in that the transcript of a prior preliminary hearing in which an absent witness testified was admitted into evidence at the trial over Appellant's objections in violation of his Sixth Amendment rights.

It is therefore Adjudged and Ordered that the judgment and sentence of the Court of Common Pleas, Lake County, Ohio, dated March 9, 1976, be and the same is

hereby reversed and vacated, and the cause be remanded to the Court of Common Pleas, Lake County, Ohio, for further proceedings according to law, and it appearing that the Appellant, Herschel Roberts, has been committed to Chillicothe Correctional Institute, in Chillicothe, Ohio, on such conviction and sentence, it is ordered that the Clerk of this Court shall certify the reversal of the judgment and conviction to the warden of the Chillicothe Correction Institute, in Chillicothe, Ohio.

/s/ ROBERT E. COOK
Judge

/s/ EDWIN E. HOFSTETTER
Judge

(JOSEPH E. O'NEILL, Judge,
Seventh District, Sitting by
Assignment)

EXCERPTS OF TRANSCRIPT OF TESTIMONY

[194] VOIR DIRE EXAMINATION OF AMY ISAACS

By Mr. Plasco:

Q. Mrs. Isaacs, you're still under oath. A. Yes.

Q. When was the last time you saw your daughter, Anita? A. Oh, the end of January.

Q. Of this year? A. Of '75.

Q. 1975? A. Yes.

Q. So, it's been thirteen (13) months since you've seen her? A. Yes.

Q. Presently, what state is she residing in, if you know? A. I don't know.

Q. Isn't it true that in January of '75 she went to California, or thereabouts? A. She went out to Tucson.

Q. To Tucson? I think you indicated to the jury that you and she had been fairly close? A. Yes.

[195] Q. Is she still single, if you know? A. Yes.

Q. And, you've had no communication between you and she since that time? A. We talked to her last Summer. We didn't know where she was, she was traveling. We don't know where she called from.

Q. She called you? A. Yes.

Q. Last Summer being the Summer of '75? A. Yes.

Q. And, since the Summer of '75, you've received no postcards, no communication whatsoever from her? A. That's correct.

Q. Have any of the other siblings, your other two daughters, received any communication from her, if you know? A. No. I know that they have not.

Q. If there would be—which we hope not—an emergency, is there any way you can reach her? A. Not that I know of.

Q. Are there any relatives that you know, that have any way of reaching her? A. No. She hasn't contacted anybody.

Q. Do you know why she hasn't communicated with you? A. I suspect that she wants to make her own way, and forget [196] all the unpleasantness that happened here, and prove something to herself and to us, and to think about her future and forget about the past.

Q. Were you present when she testified at a preliminary hearing in the Mentor Municipal Court, in January, 1975? A. Yes.

Q. Did she give you any impression that she was not telling the truth on that particular occasion? A. No. I believed her, and I still believe her.

Q. If you know, was she on any kind of drugs at that time when she testified? A. I don't think she was.

Mr. Plasco: Nothing further.

VOIR DIRE EXAMINATION OF AMY ISAACS

By Mr. Perez:

Q. Did you ever communicate with your daughter through a social worker in California, or Tucson, or somewhere? A. I did have occasion to talk to a social worker in Los Angeles earlier in the year, but I can't remember the date.

Q. Of what year? A. In '75.

Q. And, whose social worker was it? A. It was a social worker that Anita was talking to.

Q. And, did the social worker call you, or did you call [197] the social worker? A. Can we go back a little bit?

Q. Sure. A. Where did you say the social worker was?

Q. I am basing this on something—I talked to you, if you recall, one time around November, I believe, I talked to you on the telephone; do you recall that? A. Yes.

Q. And, at that time do you recall telling me that you had spoken to your daughter's social worker? A. Since she'd been away?

Q. Right. A. Yes, yes, that's correct; and I had called the social worker.

Q. And, where was this social worker at? A. San Francisco.

Q. And, you called her? A. Yes. It was a man.

Q. You called him? And, how did you happen to locate the social worker? A. We had received a form from the San Francisco County telling us that she had applied for welfare, and asking, you know, a form for us to fill out; and, it had the office address on it, so I used that address to locate the party that was dealing or was working with Anita.

[198] Q. And, did that party tell you whether or not she was in California? A. Yes.

Q. And, when was that, approximately? Within a month, if you know. A. I would say April or May of '75.

Q. And, you did not talk to your daughter on that day? A. Yes, I did.

Q. Oh, you talked to your daughter? And, is that the last time you talked to her? A. No, she called us again later in the Summer. We don't know where she called from.

Q. And, for what reason did she call you? A. Just to let us know that she was all right.

Q. And, did she indicate to you at that time that she was in Ohio or out of Ohio? A. Out of Ohio.

Q. Did she indicate to you at any time during the last two conversations with you that if she were in the State of Ohio she would contact you? A. No.

Q. Do you know of anybody who knows where she is? A. No, I do not.

Q. Do you know of anybody who would be able to get in contact with her? [199] A. I knew the name of a person that she knew in Tucson, but I don't have any address for that person and I wouldn't know how to find them.

Q. Does your husband have any other information that you do not have? A. No.

Q. Did you discuss this with your husband? A. Yes; we were trying to refresh ourselves about the sequence of events.

Mr. Perez: I have no further questions, your Honor.

Mr. Plasco: Nothing further.

The Court: Thank you, Mrs. Isaacs.

* * * * *

[VOIR DIRE ARGUMENT REGARDING THE ADMISSIBILITY OF
THE TRANSCRIBED TESTIMONY OF ANITA ISAACS]

[273] Mr. Plasco: Your Honor, at this time the defense would rest.

The Court: I assume you have some rebuttal?

Mr. Perez: Yes, your Honor. The State has a transcript, certified, of the preliminary hearing held in this matter on January 10, 1975, at which time Anita Isaacs, who is unavailable as a witness for the present hearing, did testify.

* * * * *

[274] The defendant was present at that hearing on January 10th, he witnessed that I have attempted to locate, I have subpoenaed, there has been a voir dire of the witness' parents and they have not been able to locate her for over a year. The witness, Anita Isaacs, was called by the defendant's attorney at that time, Richard Swain, and was called on behalf of the defendant. There has been no cross examination by the State. However, the State would like to have this transcript admitted by way of having a Miss Jane Carlisle take the stand, instead of Anita Isaacs, at which time I will ask Jane the questions and she will read from the transcript.

The Court: Are you acquainted with the testimony about to be heard?

Mr. Plasco: Your Honor, for the record, I was furnished the day before trial with a copy of a transcript that allegedly took place at a preliminary hearing in the Mentor Municipal Court on January 10, 1975. I have a number of objections to the admissibility of said transcript into evidence, or being read to the jury in the present case at bar.

The Court: Proceed.

[275] Mr. Plasco: Thank you, your Honor. To begin with, I'm objecting to the constitutionality of

Ohio Revised Code Section 2945.49. The general purpose of a preliminary hearing is a discovery tool where the defense attorney attempts to get information out so he can best represent his client. It is not to eliminate hearsay. Many times hearsay evidence is intentionally left in so the defense attorney can get more information.

The Prosecutor has alleged that Mr. Richard Swain, then defense attorney, called Anita Isaacs as his witness. There was no discussion prior to her testimony, the defense attorney did not know what she was going to state, and she testified with her parents present in the courtroom.

We contend that if she did testify, she was perjuring herself and did not tell the truth in the matter. There was no cross examination by the Prosecutor. We don't refute the issue that Mr. Swain is an excellent attorney, presently Judge, and that he did represent Mr. Roberts at that hearing.

[276] Another point that I want to call to the Court's attention, too, is that I don't believe that in the case here at Court Mr. Perez laid the proper predicate for bringing into evidence the transcript in question. We have one witness, Mrs. Isaacs, who testified that her daughter is no longer available and outside the jurisdiction. We have no proof at this point that her daughter did testify, that she was under oath, and it was regarding the same matter.

The Court: Well, what does the transcript say?

Mr. Plasco: Well, it's her testimony from the hearing, yes; plus, it would have to show that it's an exact copy of her testimony. The defendant is being denied his right to meet his accusers or have an opportunity to cross examine. We cannot cross examine the transcript of an earlier hearing that was over a year ago.

The Court: Well, it's rather difficult to cross examine your own witness in any event, isn't it?

Mr. Plasco: Yes, sir. She was at best a hostile witness because of her parents being in the room.

[277] The Court: Well, it takes more than that to show hostility.

Mr. Plasco: I further object, your Honor, on one more ground. This is rebuttal testimony, it's being offered into evidence as rebuttal testimony, and I believe this should have been offered into evidence during the Prosecutor's case in chief rather than rebuttal. It is not something that Mr. Roberts has said, it's not any prior recorded testimony of him, it's the recorded testimony of someone else. I have a citation on that—well, I don't have it present.

For these reasons, we would strongly object to the admissibility of the transcript as being prejudicial to Mr. Roberts' rights in violation of the U.S. Constitution—confrontation of witnesses, allowing hearsay testimony into evidence. Thank you.

The Court: Well, the certification states it is an accurate and true transcript of the preliminary hearing at the Mentor Municipal Court, of the testimony of Anita Isaacs.

Mr. Plasco: But, it goes beyond the rebuttal of what Mr. Roberts said, it goes into new areas which have not been discussed in the [278] case at bar.

The Court: That's the danger that you take when you conduct a fishing expedition in a preliminary, instead of going by the new rules providing for discovery. Proceed, Mr. Perez?

Mr. Perez: Proceed with argument, or proceed with—

The Court: With your transcript.

Mr. Perez: I would like to make one statement on the record, however. This transcript, although received by defendant's counsel in this particular form the day before trial, a similar transcript was provided the defendant's attorney well over a month before trial which was substantially similar to this, it was not in its completed form and had not been certified. Certain changes were made in the final draft and it was finally given to defendant's attorney.

Also, it was the representative of the defendant who did put this Anita Isaacs on the stand originally. I'd just like to point that out.

The Court: Fine. Would you bring in the jury.

Mr. Plasco: Your Honor, one thing for [279] the record, I also object because the person who certified it is not present in the Court today to testify these facts to be an authenticated copy.

The Court: That's why they certify it.

[280] The Court: Members of the jury, at this time I'm advising you that the defendant has completed his case and has rested on the record.

The next witness you hear will be called on behalf of the State, in rebuttal. However, the witness herself is missing. She did give prior testimony at another hearing, concerning this matter, in the Mentor Municipal Court, which earlier was duly recorded and has been typed, so you will hear it by way of a transcript of proceedings from that Court, with Mr. Perez asking the questions and—who is acting as the witness?

Mr. Perez: Jane Carlisle.

The Court: Jane Carlisle will be on the witness stand, but the witness actually is Anita Isaacs.

Mr. Perez: This is a transcript of the testimony of Anita Isaacs taken at a preliminary hearing, on January 10, 1975, before the Honorable Alfred E. Dahling, Judge of said Court.

[TESTIMONY OF ANITA ISAACS]

[281] THEREUPON, the prior testimony of ANITA ISAACS was read into the record, as follows:

"DIRECT EXAMINATION OF ANITA ISAACS

By Richard Swain:

Q. Will you state your full name to the Court, please? A. Anita Isaacs.

Q. And, where do you live, Anita? A. 2493 North Oak, in Cleveland Heights.

Q. And, how long have you lived there? A. Since last May, the end of last May.

Q. And, are you employed? A. No.

Q. Have you been employed in the last couple months? A. I just got out of school. I was in a dental technician program that finished at the end of November.

Q. Do you have anybody that is living with you at the apartment? A. No, I reside there alone, which was part of the contract with my landlord.

Q. You've had no friends, girl friends or boy friends, living there? A. Well, I've had people stay there, but I never considered them sharing the place with me. I mean, I regarded these people as guests; but I lived alone and had my name on the mailbox.

[282] Q. Now, do you know Herschel Roberts? A. Yes, I do.

Q. And, when did you first meet Mr. Roberts? A. It was about the beginning of last Summer.

Q. Back in June or July, then, is that correct, of '74? A. Yes, that is right.

Q. And, how did you happen to meet him? A. I was in a school program with a woman, and her younger sister is this man's girl friend, and so through her I became friends with my classmate's younger sister, and through her I met this man.

Q. Now, did you see him only occasionally from June or July of 1974 until the present time? A. Yes. I never kept company with him.

Q. I see. Now, isn't it a fact that he has been staying at your place for the last couple, three weeks? A. Yes. Before my parents went away, I also went away and I gave the girl, his girl friend, the keys to my apartment because she was living at home, and I said "If the two of you want to stay here while I'm away fine." And, when I got back he said that he was having trouble finding a place to stay, and I said that if you want to continue, you know, and he said it would just be for a couple of days; so, when he was there—can I go on?

[283] Q. Go ahead. A. Well, when he was there, my boy friend would come and pick me up, wherever I was, and take me to his house; and I just never spent any time in my apartment with this man.

Q. O.K. Now, when did he and his girl friend start staying in your apartment? A. It was from the 24th; now, I was away so I don't know how much time they made use of my apartment.

Q. Well, when did you go away? A. I gave the girl, I gave Katy the key on the 23rd and I went away on the 24th.

Q. Of what month? A. Of December, '74; and I came back December 30, and I never got the key back.

Q. O.K. Now, is it to your knowledge, then, that this Mr. Roberts has been staying at your apartment until the present time, from December 30th? A. Yes.

Q. O.K. And, do you know whether or not his girl friend was staying there at the same time? A. She spent time there, she had things there, and how much time they spent together there I don't know, because when he was there I wouldn't be there; I mean, I would have come home to pick up some clothes or to, [284] you

know, but I just would not spend any time there when he was there.

Q. Now, since December 30th have you spent any nights in your apartment? A. No, I haven't.

Q. Now, where have you spent the nights during this time, then? A. 2951 East Overlook.

Q. And, that is also in Cleveland Heights? A. Yes, it is.

Q. Now, have you ever had occasion to use either your father or mother's credit cards? A. Yes, I have.

Q. And, do you recall approximately when the last time was that you had the opportunity to use them? A. It was many, many months ago because I have been making a very—you can talk to my social worker—I have been making very conscientious steps to become financially independent of my parents; and, I can't even remember the last time that I had their credit cards except for a gas card, which I have never loaned out.

Q. And, do you have that gas card today? A. No, I don't, I gave it back to my parents, because it was part of the pack of the Sohio cards that were taken, so it is no good any more.

[285] Q. O.K. And, when did you return this card to your parents? A. This morning I gave it to them.

Q. I see. And, this wasn't then in the pack of credit cards, then? A. No. I had it in my purse.

Q. I would like to show you for the purpose of identification State's Exhibit B, and ask you if you have ever seen that before? A. I have never seen this one. I've never seen this.

Q. Would you state what you are seeing? A. Oh. These are my parents' credit cards, and I have never seen the one from"—it's marked inaudible—"and the NAACP, I have never seen that; I have never seen the Automobile Insurance Service Card, I have never seen

the Beston Company charge card, I have never seen the Early American Society card, I have never seen the Automobile Insurance Service and Identification card; there is a customer receipt from Halle's that I have never seen; that is funny, this is an address that I have no idea that—this isn't a name that I know or have any information that I know. I have seen this Halle's card, I've never seen this Winkelman's card; I think this is the same Sohio card that I had, but I never had this one; I don't remember seeing the Gulf [286] card. I used to use this, but—in-
audible—isn't in Cleveland any more. Hudson's I have never seen, Franklin-Simon I have used, the Stouffer's I have never seen, and the Lord and Taylor's I have never seen.

Q. Now, all of those cards are titled in what, your father's name or your mother's name? A. My father's and my mother's.

Q. And, the first two cards that you looked at, there, who are they titled in? A. In my mother's.

Q. And, who's in the NAACP? A. The NAACP is my mother's, and the Automobile Insurance has my father's initial on it.

Q. I hand you what has been marked for the purpose of identification as State's Exhibit C, and ask you if you have seen that? A. No, I have not.

Q. Not even today? A. Oh, yes, I see it now right there.

Q. You have not seen it prior to me showing you? A. No. I have not.

Q. I hand you what has been marked as State's Exhibit A; state whether or not you have seen this. A. Yes, I remember this, and I remember seeing it in my cabinet in my parents' house.

[287] Q. You have never seen it outside of the cabinet in your parents' house? A. Maybe around our home, but I've never seen it outside of our home before.

Q. You have never seen it in your apartment? A. No, I certainly haven't.

Q. And, you have never seen these credit cards in your apartment since December 30, 1974? A. No, I have not.

Q. Now, since December 24th, isn't it a fact that you have been in your parents' home since that time? A. Yes.

Q. And, do you recall the occasions that you had—"Let me read that again. "Do you recall the occasions that you had you were in there? A. I was there once, Thursday, January 2, to make sure that our neighbors had come to feed the cats, and to see if there were any packages on the steps, and I was there twenty minutes at the most; and I went next door to see the neighbors.

Q. Now, your parents weren't home at that time; isn't that correct? A. That's correct.

Q. Did you notice anything wrong, disturbed, in the house when you were there on January 2nd? [288] A. No. Everything looked in place.

Q. You did not observe any broken door or windows, or anything taken; is that correct? A. That is correct.

Q. Then, did you have somebody with you on January 2nd when you went there? A. No, I came alone.

Q. And, do you recall what time of the day that you were there? A. I was there at 11:30, and—

Q. A.M. or P.M.? A. A.M., probably from a quarter after eleven until twenty of twelve.

Q. Now, did you go over and talk to the neighbors? A. Yes, Mr. Dunbar, Manley Dunbar; and, he gave me two slices of bread because I was going to make lunch and take it to somebody.

Q. Now, since January 2nd, have you been back to the house? A. Yes. I picked up my parents at the

airport Sunday night and I was made aware that there had been a burglary. My boy friend and I drove my parents home, and at that time I saw, you know, that somebody had broken in, I saw everything out of place, and things missing, and drawers opened, and—

Q. Now, is it a fact that you have seen these credit cards [289] since the 23rd of December, and isn't it a fact also that you gave these credit cards to Mr. Roberts? A. This is the first time that I have seen them, period, period. And, except for the ones that I said I had seen, and I never gave him any credit cards.

Q. And, there was never anybody around at any time when you might have discussed anything about credit cards or the purchase of a TV set, is that correct, with the defendant? A. Could you restate that, because I—

Q. Did you ever talk to anybody about buying a color TV set? A. No. I'm not working and I couldn't afford it.

Q. You never talked to Mr. Roberts, here, about buying a color portable TV set that was his? A. No. He brought a TV set over to my apartment when he was staying there, that he was using.

Q. I see. But, you never discussed buying that TV set? A. No, I didn't.

Q. You never gave him credit cards in order to help pay for that TV set? A. To my knowledge, that TV set had been paid for. He brought it in, you know, with him when he came. I never discussed buying a TV set with Mr. Roberts.

Q. Did you have a TV set of your own? [290] A. Yes, I did.

Q. And, what kind of TV set? A. A Twenty-Dollar (\$20.00) old model, a floor model, that we got.

Q. That you—inaudible—portable? A. No, it wasn't portable, I mean, it was a standing model that

we had got from a relative of ours, and I had to work up an antenna to it and make it satisfactory.

Q. Did you have an occasion to see Mr. Roberts here on Friday, Saturday, or Sunday of this last weekend?

A. I spent that time on Overlook at the address I gave you, and I gave my friend messages. When I would go there, he would not be there; when I wanted to tell him, you know, I thought he was going to be out of there by Saturday, and then he said that he wanted to stay here over the weekend, at which point I left a note saying that I want my privacy, you know, there were things I had to take care of, could you please find somewhere else to stay? And, he was cooperative, he wasn't there after that, to my knowledge, except that when I came back there were things already moved out, so I knew that he was making an attempt to move out of there. And then, the next contact I had with him, he also had a key to my car, and he had permission to use my car over the weekend; and I asked him for my car, [291] you know, keys back and I said that I was supposed to start a job on Monday, and so I said I need my car Monday morning; and, he was cooperative in bringing the car back, he parked it, it was there. He returned it.

Q. O.K. But, you didn't talk to him in person either Friday, Saturday, or Sunday of last week? A. No.

Q. Now, the first time that you talked to him in person was what, Monday, when you went to get your car? A. No, I did not even see him then. He just left the car there.

Q. And, the keys? A. Right—no, I had a key. To my knowledge he still has a car key of mine and the front door key to my apartment, the apartment itself. He hasn't given me any keys back. The keys I had given to his girl friend, but the car key I gave to him per-

sonally; but I can't remember seeing him personally until I saw him in regards to this.

Q. One more question. Could you give me the name of your boy friend again? A. Joe Zuband.

Q. Do you know whether Joe has met Mr. Roberts or not? A. No, they haven't.

Q. The two girls that you mentioned that were connected [292] with your program, or something— A. Camille Cummings? She went to school with me.

Q. Do you know whether she knows the defendant or not? A. I know she does.

Q. I have no more questions."

Mr. Perez: Thank you very much. The State has no further rebuttal witnesses, your Honor.

Thereupon, the state rested.

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[ADDITIONAL INSTRUCTIONS TO THE JURY REGARDING THE
TRANSCRIBED TESTIMONY OF ANITA ISAACS]

[297] The Court: * * * Now, you are the sole judges of the facts, the credibility of the witnesses, and the weight of the evidence.

To weigh the evidence, you must consider the credibility of the witnesses, including the defendant. You will apply the tests of truthfulness which you apply in your everyday lives.

These tests include the appearance of each witness upon the stand; his manner of testifying; the reasonableness of the testimony; the opportunity he had to see, hear and know the things concerning which he testified; his accuracy of memory; frankness or lack of it; intelligence; interest and bias, if any; together with all the facts and circumstances surrounding the testimony. Applying these tests, you will assign to the testimony of each witness such weight as you deem proper. You are not required to believe the testimony of any witness simply because he or she was under oath. You may believe or disbelieve

all or any part of the testimony of any witness. It is your province to determine what testimony is worthy of belief and what testimony is not worthy of belief.

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[298] Some testimony was presented by way of a transcript of testimony which was read to you. This evidence is to be considered in the same light and subject to the same tests that are applied to other witnesses.

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